

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

IN RE:)
INTEL CORP. MICROPROCESSOR)
ANTITRUST LITIGATION) MDL Docket No. 05-1717-JJF
)	

PHIL PAUL, on behalf of himself and all others)
similarly situated,)

Plaintiffs,)
v.) C.A. No. 05-485-JJF
INTEL CORPORATION,) CONSOLIDATED ACTION
Defendant.)
)	

This document relates to:)
HUSTON FRAZIER, JEANNE COOK)
FRAZIER, and BRIAN WEINER, on behalf of)
themselves and all others similarly situated,)

Plaintiffs,)
v.) C.A. No. 05-780-JJF
INTEL CORPORATION,)
Defendant.)
)	

**PLAINTIFF BRIAN WEINER' S MOTION TO WITHDRAW
AS CLASS REPRESENTATIVE**

I. INTRODUCTION

Pursuant to Fed. R. Civ. Proc. 41(a)(2), plaintiff Brian Weiner, through his attorneys, brings this motion and accompanying stipulation in good faith and respectfully requests leave of Court to voluntarily withdraw from serving as a class representative in the above-captioned matter without prejudice to his rights as an absent class member.

II. STATEMENT OF FACTS

On July 11, 2005, Brian Weiner, with class representatives Huston Frazier and Jeanne Cook Frazier filed a complaint (Civ. No. C-05-2813-JL) in the United States District Court for the Northern District of California against Intel Corporation, asserting violations of Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1, California's tort law against monopoly, California Cartwright Act, and California Business and professions Code. That action was ultimately transferred to this Court, pursuant to the November 8, 2005 Transfer Order issued by the Judicial Panel on Multidistrict Litigation, and subsequently designated by this Court as Case No. 1:05-cv-00780-JJF. Additionally, this Court consolidated all the cases transferred from other districts as well as cases that were filed in this district, consisting of over seventy plaintiffs, and designated the cases as *Phil Paul, et al. v. Intel Corporation*, C.A. No. 05-00485-JJF (the "Consolidated Action").

Brian Weiner is no longer able to participate in this action as a class representative and seeks leave of court to withdraw from serving in that capacity, without prejudice to his rights as an absent member of the class.

Defendant Intel Corporation ("Defendant") does not oppose this motion. Counsel for the parties have stipulated to that effect.

III. ARGUMENT

Federal courts allow plaintiffs to withdraw as class representatives when, as here, the voluntary withdrawal sought is in good faith and "unless the defendant would suffer prejudice other than the prospect of a second lawsuit or some tactical advantage." *In re Currency Conversion Fee Antitrust Litigation*, MDL No. 1409, M 21-95, 2004 WL 2453927, at *1 (S.D.N.Y. 2004) (Exhibit A) (granting plaintiffs' motion to withdraw as class representative and denying defendants' motion to depose withdrawing plaintiffs); *see also, e.g. Arney v. Finney*, 766 F.Supp 934, 941 (D. Kan. 1991) (granting motion for leave to withdraw as class representative); *In re Insurance Management Solutions Group, Inc.*

Securities Litigation, 206 F.R.D. 514, 515 (M.D. Fla. 2002) (permitting withdrawal of named plaintiff and class representative six days before class certification).

Brian Weiner's withdrawal as class representative is in good faith and the withdrawal will not prejudice Defendant. Additionally, Mr. Weiner's withdrawal will not adversely impact the viability or continuation of this class action because the remaining class representatives in the Consolidated Action, at least seven of whom remain to represent the rights of consumers in the State of New York, adequately protect the interests of absent class members and will continue to do so.

Finally, on November 3, 2006, interim class counsel informed counsel for Defendant of their intention to voluntarily withdraw Mr. Weiner as class representative. Defendant has no objections to such withdrawal, and requested only that a motion to withdraw under Rule 41 be filed. Interim class counsel conferred with defense counsel and stipulated that Defendant does not oppose this motion. Based on their meet and confer, counsel for the parties stipulated to Mr. Weiner's voluntary withdrawal, reflected in the attached Stipulation and [Proposed] Order Granting Plaintiff Brian Weiner's Motion to Withdraw as Class Representative.

IV. CONCLUSION

For the foregoing reasons, plaintiff Brian Weiner respectfully requests that the Court grant his motion for voluntary dismissal as class representative, without prejudice to his rights as an absent class member.

Dated: November 21, 2006

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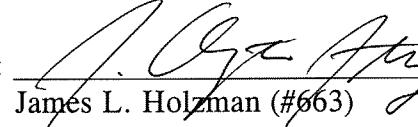
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EXHIBIT A

Westlaw.

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Briefs and Other Related Documents

In re currency Conversion Fee Antitrust Litigation S.D.N.Y., 2004. Only the Westlaw citation is currently available.

United States District Court, S.D. New York.
In re CURRENCY CONVERSION FEE
ANTITRUST LITIGATION
No. MDL NO. 1409, M 21-95.

Nov. 3, 2004.

MEMORANDUM AND ORDER

PAULEY, J.

*1 This action consolidates several putative class actions filed in this district or transferred to this Court by the Judicial Panel on Multi-District Litigation. The Second Consolidated Amended Complaint alleges violations of the Sherman Act, 15 U.S.C. § 1 *et seq.*, and the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, arising out of an alleged price-fixing conspiracy by and among VISA, MasterCard and their member banks with respect to currency conversion fees.^{FN1}

FN1. Familiarity with this Court's prior Memorandum and Order is presumed. See *In re Currency Conversion Fee Antitrust Litig.*, 265 F.Supp.2d 385 (S.D.N.Y. 2003).

Presently before this Court is a motion to withdraw by seven (7) class representatives ("Withdrawing Plaintiffs"), and defendants' application to depose each of them. For the reasons set forth below, the Withdrawing Plaintiffs' motion is granted, and defendants' motion is denied.

DISCUSSION

On February 10, 2004, seven named plaintiffs^{FN2} filed a Notice of Withdrawal as class

representatives.^{FN3} Defendants oppose withdrawal, arguing that the Withdrawing Plaintiffs may not withdraw unilaterally as class representatives, without this Court's approval pursuant to Rules 21 and 41(a)(2) of the Federal Rules of Civil Procedure. (Defendant's Memorandum in Opposition of Withdrawal, dated Feb. 20, 2004 ("Def.Mem.") at 4.) Defendants further contend that if this Court allows withdrawal, they should nevertheless be allowed to depose the Withdrawing Plaintiffs to learn the "circumstances surrounding [their] putative 'withdrawals.'" (Letter to the Court from Brian P. Brosnahan, dated Oct. 18, 2004 at 2.)

FN2. These plaintiffs are Howard Steinlauf, Caran Ruga, Ester Grace Javier, Jonathan Lipner, Tim Lynch, Diane Lynch and Pamela Geller Oshrey.

FN3. During the briefing of these motions, the Withdrawing Plaintiffs invoked Rule 21 to withdraw from the pending actions. (Letter to the Court from Christopher M. Burke, dated Oct. 13, 2004 at 3.)

Rule 23 of the Federal Rules of Civil Procedure requires that the class representatives' interests be congruent with those of the class. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 331 (1980) (stating that class representatives must "represent the collective interest of the putative class" in addition to their own private interests); *see also Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1077 (2d Cir. 1995) ("Both class representatives and class counsel have responsibilities to absent members of the class."); *In re Avon Sec. Litig.*, No. 91 CIV. 2287(LMM), 1998 WL 834366, at *10 n. 5 (S.D.N.Y. Nov. 30, 1998) ("Even before a class has been certified, counsel for the putative class owes a fiduciary duty to the class.").

Class plaintiffs must adequately represent the

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interests of absent class members. *See Maywalt*, 67 F.3d at 1078 (“The ultimate responsibility to ensure that the interests of class members are not subordinated to the interests of either the class representatives or class counsel rests with the district court.”). Plaintiffs suggest that the Withdrawing Plaintiffs’ are unable to protect the interests of class members. (Plaintiff’s Reply in Support of Withdrawal, dated Apr. 1, 2004 (“Reply.Mem.”) at 3-4.) A court may allow plaintiffs to withdraw as class representatives. *See, e.g., In re Relafen Antitrust Litig.*, 218 F.R.D. 337, 341 n. 4 (D.Mass.2003); *Krim v. pcOrder.com, Inc.*, 210 F.R.D. 581, 583 n. 2 (W.D.Tex.2002). If the Withdrawing Plaintiffs are inadequate representatives, due process requires their withdrawal as class representatives. *See, e.g., Avon Sec.*, 1998 WL 834366, at *10 (allowing plaintiffs’ counsel to substitute class representatives where “success in asserting rights or defenses of a client in litigation in the nature of a class action is dependent upon the joinder of others”). Indeed, “[a]bsent a good reason ... a plaintiff should not be compelled to litigate if it doesn’t wish to.” *Org. of Minority Vendors, Inc. v. Ill. Cent. Gulf R.R.*, No. 79 C 1512, 1987 WL 8997, at *1 (N.D.Ill. Apr. 2, 1987); *accord In re Neopharm, Inc. Sec. Litig.*, No. 02 C 2976, 2004 WL 742084, at *1 (N.D.Ill. Apr. 7, 2004); *see also Conafay v. Wyeth Labs.*, 793 F.2d 350, 353 (D.C.Cir.1986) (noting that in federal practice, voluntary dismissals sought in good faith are generally granted “unless the defendant would suffer prejudice other than the prospect of a second lawsuit or some tactical advantage.”). Here, the Withdrawing Plaintiffs seek not only to withdraw as class representatives, but as plaintiffs as well. To ensure that reluctant plaintiffs do not jeopardize the interests of absent class members, this Court approves the Withdrawing Plaintiffs’ application.

*2 As noted above, defendants seek to depose the Withdrawing Plaintiffs to learn about the circumstances surrounding their withdrawals. “[T]he burden on the defendant to justify discovery of absent class members by means of deposition is particularly heavy.” *Redmond v. Moody’s Investor Serv.*, No. 92 Civ. 9161(WK), 1995 WL 276150, at *1 (S.D.N.Y. May 10, 1995). Indeed, “discovery of absent class members regarding individual issues,

as opposed to common questions, is inappropriate.” *Redmond*, 1995 WL 276150, at *1. Here, defendants seek depositions for individual issues, and therefore have not overcome their heavy burden to justify such a request. Accordingly, this Court holds that defendants may not depose the Withdrawing Plaintiffs.^{FN4}

FN4. To the extent defendants can show expenses incurred with respect to their attempts to depose the Withdrawing Plaintiffs, “the proper remedy for such wasted expenditures would be reimbursement of costs rather than a denial of voluntary dismissal.” *In re Vitamins Antitrust Litig.*, 198 F.R.D. 296, 304 (D.D.C.2000).

CONCLUSION

For the foregoing reasons, the Withdrawing Plaintiffs’ motion is granted, and defendants’ motion to depose the Withdrawing Plaintiffs is denied.

S.D.N.Y.,2004.

In re Currency Conversion Fee Antitrust Litigation
 Not Reported in F.Supp.2d, 2004 WL 2453927
 (S.D.N.Y.)

Briefs and Other Related Documents (Back to top)

- 2005 WL 4000674 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Defendants’ Motion for Dismissal of Ross v. Bank of America Under Rule 41(b) (Nov. 14, 2005) Original Image of this Document (PDF)
- 2005 WL 3662766 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of the Motion of Defendants Citigroup Inc., Citibank (South Dakota), N.A., Universal Bank, N.A., Universal Financial Corp., and Citicorp Diners Club, Inc. for a Stay of Litigation Pending Arbitration (Jan. 7, 2005)
- 2004 WL 3655632 (Trial Motion, Memorandum and Affidavit) Defendants’ Joint Reply Memorandum in Support of Motion for Reconsideration of Order Granting Class Certification (Dec. 1, 2004)

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 (Cite as: Not Reported in F.Supp.2d)

- 2004 WL 2973928 (Trial Motion, Memorandum and Affidavit) Defendant Citibank's Memorandum of Law in Opposition to Plaintiffs' Motion to Certify a Subclass under County of the Second Consolidated Amended Class Action Complaint (Feb. 18, 2004)
- 2003 WL 23671548 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Motion for Class Certification (Nov. 12, 2003)
- 2003 WL 24330169 () (Report or Affidavit) (Nov. 11, 2003) Original Image of this Document (PDF)
- 2003 WL 24334342 (Trial Pleading) Second Consolidated Amended Class Action Complaint (Aug. 14, 2003) Original Image of this Document (PDF)
- 2003 WL 23671546 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Memorandum in Support of Their Position That Disputed Document BOA2072-BOA2077 is Not Privileged (Jun. 15, 2003)
- 2003 WL 23671547 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Reply Memorandum in Support of Their Position that Disputed Document BOA2072-BOA2077 is not Privileged (Jan. 15, 2003)
- 2002 WL 32595541 (Trial Motion, Memorandum and Affidavit) Memorandum of Points and Authorities In Support of Phil Salvagio's Notice of Voluntary Dismissal Without Prejudice and Motion for Court Approval Thereof (Jun. 25, 2002)
- 2002 WL 32595540 (Trial Motion, Memorandum and Affidavit) Reply Memorandum of Law in Support of Defendants' Motion to Dismiss the Consolidated Amended Class Action Complaint (May. 24, 2002)
- 2002 WL 32595543 (Trial Motion, Memorandum and Affidavit) Reply Memorandum in Support of Motion of Defendants First USA Bank, N.A., Bank One Corporation, Bank of America, N.A. (USA), Bank of America Corporation, Mbna America Bank, N.A., and Mbna Corporation To Compel Arbitration (May. 24, 2002)
- 2002 WL 32595538 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Opposition to Defendants' Motions to Dismiss the Consolidated Amended Class Action Complaint (May. 03, 2002)
- 2002 WL 32595539 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Memorandum of Law in Opposition to Motion of Defendants First USA

- Bank, N.A., Bank One Corporation, Bank of America Corporation, Bank of America, N.A. (U.S.A.), MBNA America Bank, N.A., and MBNA Corporation to Compel Arbitration (May. 03, 2002)
- 2002 WL 32595525 (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Citigroup Defendants' Motion to Dismiss (Mar. 21, 2002)
- 2002 WL 32595529 (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Motion of Defendants First USA Bank, N.A., Bank One Corporation, Bank of America, N.A. (USA), Bank of America Corporation, MBNA America Bank, N.A., and MBNA Corporation to Compel Arbitration (Mar. 21, 2002)
- 2002 WL 32595536 (Trial Motion, Memorandum and Affidavit) Memorandum of Law of Visa in Support of Defendants' Motion to Dismiss the Consolidated Class Action Complaint (Mar. 21, 2002)
- 2001 WL 34611472 (Trial Motion, Memorandum and Affidavit) Plaintiffs' Opposition to Defendants' Motion to Stay Discovery (Oct. 25, 2001)
- 2001 WL 34611470 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Defendants' Motion to Stay Discovery (Oct. 17, 2001)
- 2000 WL 34403316 (Trial Motion, Memorandum and Affidavit) Memorandum of Defendants Bank of America Corporation and Bank of America, N.A. (USA) in Opposition to Plaintiffs' Application to Compel the Production of the Privileged Document BOA 2072 - BOA 2077 (Jan. 15, 2000)

END OF DOCUMENT

CERTIFICATE OF SERVICE

I, J. Clayton Athey, hereby certify that on this 21st day of November, 2006, I caused the foregoing **PLAINTIFF BRIAN WEINER' S MOTION TO WITHDRAW AS CLASS REPRESENTATIVE** to be served on the following counsel via electronic filing:

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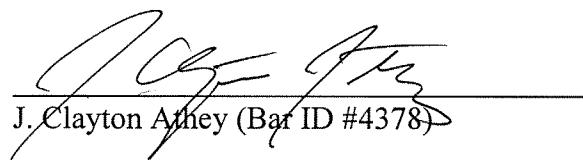
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